

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

THE PROTECT DEMOCRACY PROJECT,
INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Civil Action No. 19-12115

COMPLAINT

The Protect Democracy Project, Inc. (“Protect Democracy”), by its undersigned attorneys, alleges:

INTRODUCTION

1. As the 2020 presidential election fast approaches, President Donald J. Trump, his personal lawyer, Rudolph Giuliani, and others have sought inappropriately to influence Ukraine’s government and its justice system in an effort to bolster the President’s reelection prospects.¹

2. The President and Mr. Giuliani have acted outside legitimate law enforcement and diplomatic channels in coercing the Ukrainian government into pursuing politically-motivated investigations of one of the President’s political rivals, former Vice President Joseph R. Biden, and his son Robert Hunter Biden (“Hunter Biden”).²

¹ Olivia Beavers, *House Democrats Launch Probe into Whether Trump, Giuliani Pressured Ukraine to Target Biden*, The Hill (Sept. 9, 2019), <https://thehill.com/policy/national-security/460528-house-democrats-launch-sprawling-probe-into-whether-giuliani>.

² *Id.*

3. Earlier this year, Mr. Giuliani had multiple meetings in New York and Warsaw with Yuriy Lutsenko, who at the time served as Ukraine's Prosecutor General.³ According to news reports, the two men discussed allegations of wrongdoing by Hunter Biden and the status of the investigation into the Bidens.

4. According to news reports, Mr. Giuliani then repeatedly sought to pressure the government of Ukraine to reopen investigations into both the Bidens and allegations that Ukraine was involved in efforts to influence the 2016 U.S. election.

5. Mr. Giuliani obtained assistance from the United States Department of State ("State Department") officials in connection with these efforts. Text messages released by the House Permanent Select Committee on Intelligence reveal that Kurt Volker, then the U.S. special representative to Ukraine, introduced Mr. Giuliani to Andrey Yermak, a close adviser to Ukrainian President Volodymyr Zelensky.⁴ Mr. Volker later "[o]rchestrated a great phone call" between Mr. Giuliani and Mr. Yermak, and helped to arrange a meeting between the two in Madrid in August 2019.⁵

6. Mr. Volker and U.S. Ambassador to the European Union Gordon Sondland later sought Giuliani's input on a statement they were drafting for President Zelensky regarding his intention to conduct the investigations sought by President Trump and Mr. Giuliani.⁶

7. Recent reports indicate that, in conjunction with these efforts, President Trump told his acting chief of staff, Mick Mulvaney, to withhold almost \$400 million in military aid for

³ Rebecca Ballhaus, *et al.*, *Giuliani Sits at the Center of the Ukraine Controversy*, Wall St. Journal (Sept. 26, 2019), <https://www.wsj.com/articles/giuliani-sits-at-the-center-of-the-ukraine-controversy-11569546774>.

⁴ Eliot Engel, Chairman, House Committee on Foreign Affairs and Adam Schiff, Chairman, House Permanent Select Committee on Intelligence, Letter to Committee Members, at 4 (Oct. 3, 2019), <https://foreignaffairs.house.gov/cache/files/a/4/a4a91fab-99cd-4eb9-9c6c-ec1c586494b9/621801458E982E9903839ABC7404A917.chairmen-letter-on-state-department-texts-10-03-19.pdf>.

⁵ *Id.* at 5.

⁶ *Id.* at 6.

Ukraine. Approximately one week later, on July 25, 2019, the President had a phone conversation with President Zelensky in which he urged President Zelensky to investigate the Bidens.⁷

8. These actions raise substantial constitutional issues and threaten the impartial rule of law on which our democracy depends. Moreover, they reflect a dangerous blurring of the lines between the President's personal political interests and the nation's diplomatic goals.

9. In the wake of these revelations, House Speaker Nancy Pelosi announced a formal impeachment inquiry into President Trump's conduct.⁸

10. To understand how the President's personal political interests may have come to dominate U.S. diplomatic activities in Ukraine, the American public has the right to access information regarding interactions that Mr. Giuliani may have had with State Department officials, including those stationed at the embassy in Ukraine.

11. Accordingly, on September 24, 2019, Plaintiff submitted two Freedom of Information Act ("FOIA") requests, the first seeking expedited production of communications about Mr. Giuliani by any staff members of the U.S. Embassy in Ukraine, and the second seeking expedited production of documents relating to communications between Mr. Giuliani and any staff members of the U.S. Embassy in Ukraine.

⁷ Karoun Demirjian, *et al.*, *Trump Ordered Hold on Military Aid Days Before Calling Ukrainian President, Officials Say*, Wash. Post (Sept. 23, 2019), https://www.washingtonpost.com/national-security/trump-ordered-hold-on-military-aid-days-before-calling-ukrainian-president-officials-say/2019/09/23/df93a6ca-de38-11e9-8dc8-498eabc129a0_story.html.

⁸ Nicholas Fandos, *Nancy Pelosi Announces Formal Impeachment Inquiry of Trump*, N.Y. Times (last updated Oct. 4, 2019), <https://www.nytimes.com/2019/09/24/us/politics/democrats-impeachment-trump.html>. Speaker Nancy Pelosi, for example, said in a brief speech that the actions taken by President Trump "have seriously violated the Constitution," and that the President "must be held accountable," for no one is above the law. *Id.*

12. Plaintiff brings this action against the State Department to compel compliance with FOIA, 5 U.S.C. § 552, and the State Department's implementing regulations, 22 C.F.R. §§ 171.10–171.18.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

14. Venue is proper pursuant to 5 U.S.C. § 552(a)(4)(B).

15. Defendant has failed to meet the statutory deadline set by FOIA. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I). Plaintiff has therefore exhausted all administrative remedies, pursuant to 5 U.S.C. § 552(a)(6)(C).

PARTIES

A. Plaintiff

16. Plaintiff Protect Democracy is a non-partisan organization with 501(c)(3) tax-exempt status. It maintains an office in Watertown, MA, and approximately one quarter of the organization's staff is based in that office. Laurence M. Schwartztol, who submitted the FOIA requests on behalf of Protect Democracy, works in the Watertown office.

17. Plaintiff's mission is to protect the United States' democracy from descending into a more authoritarian form of government by preventing those in power from depriving Americans of a free, fair, and fully-informed opportunity to exercise ultimate sovereignty. As part of this mission, Plaintiff seeks to inform public understanding of operations and activities of the government by gathering and disseminating information that is likely to contribute significantly to the public understanding of the federal government's operations and activities. Plaintiff regularly requests such information pursuant to FOIA.

18. Plaintiff intends to give the public access to documents transmitted via FOIA on its website, www.protectdemocracy.org, and to provide information about and analysis of those documents as appropriate.

B. Defendant

19. Defendant State Department is a federal agency within the meaning of 5 U.S.C. § 552(f)(1) and 5 U.S.C. § 551. Defendant is headquartered at 2201 C Street, NW, Washington, D.C. 20520. Defendant has possession, custody, and control of the documents that Plaintiff seeks in response to its FOIA request.

FACTUAL ALLEGATIONS

20. On September 24, 2019, Plaintiff electronically submitted a FOIA request (the “First Request”) to Defendant, seeking the following records:

- (a) All documents, including but not limited to emails or memoranda, reflecting or relating to communications about Rudolph Giuliani by any staff member(s) of the U.S. Embassy in Ukraine.

A true and correct copy of Plaintiff’s First Request is attached as Exhibit A.

21. On the same day, Plaintiff electronically submitted a second FOIA request (the “Second Request”) to Defendant, seeking the following records:

- (b) All documents, including but not limited to emails or memoranda, reflecting or relating to communications between Rudolph Giuliani and any staff member(s) of the U.S. Embassy in Ukraine.

A true and correct copy of Plaintiff’s Second Request is attached as Exhibit B.

22. Plaintiff sought fee waivers pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Ex. A at 3; Ex. B at 3.

23. On the same day, Plaintiff received two emails from Defendant confirming receipt of both requests. A true and correct copy of Defendant's emails is attached as Exhibit C.

24. Plaintiff demonstrated a compelling need for the fee waivers based on its status as a representative of the media and because disclosure of the information "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(ii)-(iii).

25. Further, this information would help inform "a breaking news story of general public interest," for the public has an urgent need to understand what, if any, role Mr. Giuliani played in pressuring Ukraine to investigate the Bidens. 22 CFR 171.12(b)(2)(i). Given the imminence of related Congressional proceedings and the relevance of the requested information to those proceedings, the information sought in this request "has a particular value that will be lost if not disseminated quickly." 22 CFR 171.12(b)(2)(i).

26. Plaintiff also requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 22 C.F.R. § 171.12(b). Ex. A at 1-3; Ex. B at 1-3. Plaintiff's requests were narrowly tailored to allow Defendant to respond to it in an expedited fashion.

27. Plaintiff demonstrated a compelling need for expedited processing because it is "primarily engaged in disseminating information" and the requested information is both "urgently needed" and concerns "[a]ctual or alleged Federal Government activity." 22 C.F.R. § 171.12(b).

28. Defendant has thus far failed to respond to Plaintiffs' requests for expedited processing of either the First or Second Request.

29. Defendant has no lawful basis for declining to grant Plaintiff's requests for expedited processing or for producing any responsive records requested by Plaintiff.

CLAIM FOR RELIEF
(Violation of FOIA, 5. U.S.C. § 552)

30. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

31. Defendant State Department is subject to FOIA and must therefore release in response to FOIA requests any disclosable records in its possession at the time of the requests and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

32. Defendant's denial of and failure to respond to Plaintiff's requests for expedited processing violate FOIA. *See* 5 U.S.C. § 552(a)(6)(E)(i).

33. Defendant has no lawful basis for declining to expeditiously produce the records requested by Plaintiff under FOIA.

34. Accordingly, Plaintiff is entitled to an order compelling the State Department to grant Plaintiff's requests for expedited processing and to release, as soon as practicable, any responsive documents.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- a. Declare that Plaintiff is entitled to expedited processing under 5 U.S.C. § 552(a)(6)(E)(i) and 22 C.F.R. § 171.12(b), and fee waivers under 5 U.S.C. § 552(a)(4)(A)(iii);
- b. Declare that the records sought by Plaintiff in its FOIA requests are public records under 5 U.S.C. § 552(a)(2)(D), which should be disclosed pursuant to 5 U.S.C. §§ 552(a)(6)(A) and 552(a)(3)(A) and Defendant's corresponding regulations;
- c. Order Defendant to grant Plaintiff's requests for expedited processing and fee waivers;
- d. Order Defendant, by a date certain, to conduct an adequate search that is reasonably likely to lead to the discovery of any and all records responsive to Plaintiff's requests;

- e. Order Defendant, by a date certain, to produce to Plaintiff any and all non-exempt records or portions of records responsive to Plaintiff's requests, as well as a *Vaughn* index of any records or portions of records withheld due to a claim of exemption;
- f. Award Plaintiff the costs and reasonable attorney's fees incurred in this action, *see* 5 U.S.C. § 552(a)(4)(E);
- g. Grant Plaintiff such other relief as the Court deems appropriate.

Dated: October 11, 2019

Respectfully submitted,

THE PROTECT DEMOCRACY PROJECT, INC.

By: /s/ Benjamin L. Berwick

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Counsel for Plaintiff‡

* Admitted to the bar in the state of Massachusetts. Application for admission to the District of Massachusetts forthcoming.

† Motion for admission *pro hac vice* forthcoming.

‡ Harvard Law Students Joseph Choe, '21, and Xiaoyi Xu, '21, helped prepare this complaint. The complaint does not purport to represent the institutional views, if any, of Harvard Law School.